

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 21, 2003

STATE OF TENNESSEE v. ELIZABETH M. CLARK

Appeal from the Circuit Court for Blount County
No. C-13811 D. Kelly Thomas, Jr., Judge

No. E2002-01592-CCA-R3-CD
December 1, 2003

A Blount County Circuit Court grand jury indicted defendant for Class C felony theft of property valued at more than \$10,000 but less than \$60,000. *See* Tenn. Code Ann. § 39-14-103 (2003). After the defendant pleaded guilty and following a sentencing hearing, the trial court imposed a six-year, Range I sentence and ordered her to serve 90 days in the county jail, with eligibility for work release and with the rest of her sentence to be served on supervised probation. The defendant was also required to pay restitution in the amount of \$54,264.15. She now appeals the trial court's sentencing determinations. Finding no reversible error, we affirm the lower court's judgment.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOE G. RILEY and THOMAS T. WOODALL, JJ., joined.

Mack Garner, District Public Defender, Maryville, Tennessee, for the Appellant, Elizabeth M. Clark.

Paul G. Summers, Attorney General & Reporter; Kim R. Helper, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Edward P. Bailey, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The underlying facts are straightforward. The victim, Wood Products International, LLC, employed the defendant to handle money, record shipments, and pay bills. In June 2000, the defendant began stealing money by printing a company check on a computer, signing the check, and then cashing the check at her bank. The defendant did not have signatory authority for Wood Products International. The defendant continued to steal money through September 2001, taking \$54,264.15 in total.

In the plea agreement, the parties agreed to allow the trial court to determine the length and manner of service of the sentence. At the sentencing hearing, the state recommended that the defendant be sentenced to the statutory maximum of six years with a significant amount of incarceration. The defense countered by urging a sentence of six years with eight years of intensive probation in lieu of any confinement. The trial court, in giving the defendant the presumption of suitability for alternative sentencing, imposed a six-year sentence and placed the defendant on supervised probation conditioned upon payment of restitution and costs and the service of 90 days in the Blount County Jail, with eligibility for work release.

According to evidence introduced at the sentencing hearing, the defendant was 33 years of age, single, with custody of two teenaged children. She received no support payments from the children's father, who was approximately \$7,000 in arrears in paying child support. The defendant had a tenth grade education but had attained a graduate equivalency diploma. She had no history of drug or alcohol abuse but was undergoing therapy and receiving medication for bipolar disorder. At the time of sentencing, she was the sole supporter of her children and was working at a restaurant and painting houses, earning a total of approximately \$2,000 per month.

In imposing the defendant's sentence, the trial court applied enhancement factor (7), that the amount of damage to property sustained by or taken from the victim was particularly great, and enhancement factor (16), that the defendant abused a position of private trust. *See* Tenn. Code Ann. § 40-35-114(7), (16) (2003). The court applied mitigating factor (13) in finding that the defendant committed a non-violent offense and had turned herself in to the authorities. *See id.* § 40-35-113(13) (2003).

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991); *see State v. Hooper*, 29 S.W.3d 1, 5 (Tenn. 2000). "The burden of showing that the sentence is improper is upon the appellant." *Ashby*, 823 S.W.2d at 169. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the specific sentence and the propriety of sentencing alternatives by considering: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes

to make in the defendant's behalf about sentencing; and (7) the potential, or lack thereof, for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -103(5) (2003); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

Tennessee Code Annotated section 40-35-201(c) provides that if the trial court recognizes no enhancement or mitigating factors for Class C felonies, then the presumptive sentence is the minimum sentence in the appropriate range. Tenn. Code Ann. § 40-35-201(c) (2003); see *State v. Lavender*, 967 S.W.2d 803, 806 (Tenn. 1998). However, should enhancement or mitigating factors exist, the trial court must enhance or reduce the sentence as appropriate. *State v. Arnet*, 49 S.W.3d 250, 257 (Tenn. 2001).

The defendant claims that the trial court erred by applying the enhancement factors. Although theft offenses ordinarily are not subject to enhancement under factor (7) because the amount of the theft determines the felony classification, see *State v. Grissom*, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997), it may be properly applied when the amount of the theft greatly exceeds the amount necessary to qualify for the felony classification, *State v. Jacob Dyck*, No. E2001-00476-CCA-R3-CD, slip op. at 9-10 (Tenn. Crim. App., Knoxville, Apr. 22, 2002), *perm. app. denied* (Tenn. 2002). Here, the defendant stole \$54,264.15, almost the maximum for the Class C felony classification. We, therefore, hold that the trial court properly applied enhancement factor (7).

We are likewise convinced that the lower court properly enhanced the defendant's sentence based on her abuse of a position of private trust. See Tenn. Code Ann. § 40-35-114(16) (2003). The evidence shows that, over a period of fifteen months and as the victim's only non-owner employee, the defendant exploited her position as the bookkeeper to steal money from her employer. Moreover, the evidence shows that even though the defendant "didn't mean to take the money," she knew that her criminal activity was hurting the owner's business, the owner, and the owner's family; she, nevertheless, continued forging checks and embezzling money. The defendant was so situated in the business organization that she had access to the company checks and, as bookkeeper, was able to conceal the theft of money. See *State v. Victoria S. Galindo*, No. M1999-00768-CCA-R3-CD, slip op. at 3 (Tenn. Crim. App., Nashville, Apr. 14, 2000) (approving use of factor (16) in embezzlement situation). Factor (16) properly applies.

The defendant further claims that the trial court erred in not taking into consideration all statutory mitigating factors applicable to her situation. The defendant claims that the following mitigating factors should have been applied: (1) (offensive conduct neither caused nor threatened bodily injury); (5) (offender made a pre-detection, good faith attempt to compensate the victim); (7) (offender motivated by desire to provide necessities for self or family); (8) (offender suffered from mental or physical condition that significantly reduced culpability); and (10) (offender assisted authorities in locating or recovering any property involved in the crimes). See Tenn. Code Ann. § 40-35-113 (2003). In our view, the record may well support the application of mitigation factors (1), (7), and (10); however, these mitigating factors, along with factor (13) that the trial court applied, do not prompt a reduction of the sentence. We agree with the trial court that the enhancement factors have substantial weight, justifying a maximum sentence despite the minimal impact of rather

insubstantial mitigating factors. *See State v. Samuel D. Braden*, No. 01C01-9610-CC-00457, slip op. at 14 (Tenn. Crim. App., Nashville, Feb. 18, 1998) (enhancement factors were “sufficient, not only to elevate the sentence to the maximum ceiling, but also to firmly embed the sentence in the ceiling”). Given this conclusion and the trial court’s proper finding that the only mitigating factor entitled to significant weight was factor (13), we conclude that the maximum sentence of six years is supported by the record and is the appropriate sentence in this case.

Additionally, the defendant argues that based on her presumed favorable candidacy for probation, the trial court should have ordered full probation. *See* Tenn. Code Ann. § 40-35-102(6).

A defendant is eligible for full probation if the sentence imposed is eight years or less, subject to certain inapplicable statutory exclusions. Tenn. Code Ann. § 40-35-303(a) (2003). Although full probation must be considered by the trial court as a sentencing alternative when the defendant is eligible, the defendant is not automatically entitled to probation as a matter of law. *Id.* § 40-35-303(b) (2003), Sentencing Comm’n Comments; *State v. Hartley*, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991). To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *See State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). In determining whether to grant full probation, a trial court should consider: (1) the nature and circumstances of the criminal conduct involved, Tenn. Code Ann. § 40-35-210(b)(4) (2003); (2) the defendant’s potential or lack of potential for rehabilitation, including the risk that during the period of full probation the defendant will commit another crime, *id.* § 40-35-103(5) (2003); (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, *id.* § 40-35-103(1)(B) (2003); and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, *id.* § 40-35-103(1)(C) (2003); *see Bingham*, 910 S.W.2d at 456. The trial court may also consider the defendant’s lack of credibility, as it reflects on the defendant’s potential for rehabilitation. *State v. Chestnut*, 643 S.W.2d 343, 353 (Tenn. Crim. App. 1982).

The trial court did not expressly declare whether the defendant had carried the burden of demonstrating that full probation would serve the interests of justice. However, the trial court balanced defendant’s cooperation, remorse, and truthfulness against the victim impact statement, the state’s recommendation, the magnitude of the offense, and the defendant’s own testimony, to conclude that defendant should be incarcerated before being released into the community.

We conclude that the record supports the determination that the defendant failed to establish entitlement to full probation. The nature and circumstances of the offense suggest a disturbing level of culpability and indicate that full probation would depreciate the seriousness of the aggregate theft. Also, we are concerned that excusing the defendant from any incarceration would fail to deter others from committing similar crimes. We believe these factors outweigh the

defendant's positive prospects for rehabilitation and justify the limited amount of incarceration ordered by the trial court.

The judgment below is affirmed.

JAMES CURWOOD WITT, JR., JUDGE